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The Southern Question.

A VIEW

OF THE

POLICY AND CONSTITUTIONAL

POWERS OF THE PRESIDENT,

AS TO

THE SOUTHERN STATES.

BY J. P. BISHOP,
OF THE CLEVELAND BAR.

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[From the Cleveland Herald.]

THE SOUTHERN QUESTION.

We give in this issue an article by Judge Bishop on the Southern policy of President Hayes which is deserving careful attention. The purpose of the Judge was to meet the objections which have been made to that policy by earnest Republicans who have seen in it an abandonment by the President of the principles of the party which placed him in his present position.

The declarations of the Convention which nominated him, the expression of his views contained in the letter of acceptance, and the reiteration of that expression in his Inaugural are quoted to show that in adopting his course toward the Southern States the President has violated no promise or pledge given to the Republican party, but on the contrary is carrying out the promises he made and is acting in strict accordance with the principles laid down in the platform of the Convention which nominated him. If that platform and his public declarations in accepting the nomination and in entering upon the duties of the office to which he was elected were to be anything but empty professions, merely made to deceive, there was no other course open to him than that which he has taken. President Hayes can have deceived none but those who expected that on taking office he would deceive the public by breaking the promises he had made before his election.

Again, Judge Bishop shows that under the circumstances the President could scarcely, without grave impropriety—to use the lightest expression under the circumstances possible—have refused to withdraw the troops from their position of interference in a contest for the Governorship in the States of South Carolina and Louisiana. The Supreme Court decisions quoted go to show that such interference, in cases representing the features of those in the two States named, finds but doubtful warrant in the Constitution, if not absolutely prohibited by that instrument. The fact that the use of the troops for such a purpose not only received no countenance from Congress but was in direct violation of the wishes of the popular branch of that body, furnished another justification of the President's course.

We believe the opposition to the President's Southern policy is rapidly diminishing, and should it prove successful in pacifying the South and increasing its material prosperity without seriously endangering the peace and welfare of any class of its citizens—and that can only be determined by actual experiment—the wisdom of the course adopted will be generally admitted. If expectations of a satisfactory outcome of the experiment are disappointed, there will still remain the machinery provided by the Constitutional amendments, and the laws which have been or may be passed under those amendments, for the protection of the oppressed and the punishment of the wrong-doers.

THE SOUTHERN QUESTION.

A VIEW OF THE POLICY AND CONSTITUTIONAL POWERS OF THE PRESIDENT, AS TO THE SOUTHERN STATES.

By J. P. BISHOP, of the Cleveland Bar.

To Hon. Sherlock J. Andrews, Hon. Horace Foote, and Hon. Samuel B. Prentiss:

With your consent I inscribe to you the following brief "View" of a great National question.

I do this for two reasons:

First—That distinguished and honored as you are as citizens, lawyers, and jurists, I may be careful to present only the *true* "view."

Second—That if there is error in this "View" it may readily be detected and exposed.

J. P. BISHOP.

CLEVELAND, May, 1877.

During the Presidential conflict which has recently terminated in the inauguration of Rutherford B. Hayes as President of the United States, I had occasion thoroughly to examine the Federal Constitution, and especially those provisions which related to the validity of the election of Presidential Electors, and the manner of transmitting, opening, counting, and declaring the result of the Electoral vote. Since the inauguration another *conflict* has arisen, not as to the office, but as to the policy of the Administration, *This* conflict has assumed the more serious aspect since it is among those mainly who were active in securing the election of the President whose policy is called in question. The policy thus questioned is called

PRESIDENT HAYES' SOUTHERN POLICY.

The most conspicuous of those calling this policy in question is Ex-Senator Wade. But many other very distinguished citizens are more or less emphatic in expressing disapproval of this policy. Having observed this, I have been desirous of ascertaining the cause of these complaints and the foundation on which they rest, and the constitutional warrant both for and against this "Southern policy."

Mr. Wade claims to have been *grievously* deceived by the course of the new Administration and as bitterly repentant that he ever was instrumental in favoring or using his influence in the nomination or election of President Hayes. This is the more to be regretted, as generally those arraigning the President are (many of them) citizens of the noblest impulses and have occupied distinguished and useful positions in their several States and in the National Government. This is most emphatically so with Senator Wade.

Now that we find ourselves thus situated at the very threshold of the present Administration, like the pilot and officers of the ship at sea in a storm, when driven about in its course, before we venture to proceed very far we should take our observations, see to our bearings and soundings.

And let us consider at the outset—

HAS THE PRESIDENT DEPARTED FROM THE POLICY MARKED OUT FOR HIM BY HIS PARTY AND ACCEPTED BY HIM?

This can only be answered by examining the Republican platform adopted on this subject when the nomination was made and the acceptance of it.

THE RESOLUTION RELATING TO THIS QUESTION.

"3. The permanent pacification of the Southern section of the Union, and the complete protection of all its citizens in the free enjoyment of all their rights is a duty to which the Republican party stands sacredly pledged. The power to provide for the enforcement of the principles embodied in the recent constitutional amendments is vested by those amendments in the Congress of the United States, and we declare it to be the solemn obligation of the legislative and executive departments of the Government to

put into immediate and vigorous exercise all their constitutional powers for removing any just causes of discontent on the part of any class, and for securing to every American citizen complete liberty and exact equality in the exercise of all civil, political, and public rights. To this end we imperatively demand a Congress and a Chief Executive whose courage and fidelity to these duties shall not falter until these results are placed beyond dispute or recall."

GOVERNOR HAYES' LETTER OF ACCEPTANCE OF THE NOMINATION.

As to the platform as a whole he says: "The resolutions are in accord with my views and I heartily concur in the principles which they announce."

Then, upon the subject of this resolution he expressed his opinions without reserve and most emphatically. I give the part of the letter bearing upon the subject: The letter says: "The condition of the Southern States attracts the attention and commands the sympathy of the people of the whole Union in their progressive recovery from the effects of the war. Their first necessity is an intelligent and honest administration of the Government which will protect all classes of citizens in all their political and *private* rights. What the South most needs is peace and peace depends upon the supremacy of law. There can be no enduring peace if the constitutional rights of any portion of the people are habitually disregarded. A division of political parties, resting merely upon the distinctions of race, or upon sectional lines, is always unfortunate and may be disastrous.

"The welfare of the South, alike with that of every part of the country, depends upon the attractions it can offer to labor, to immigration, and to capital; but laborers will not go, and capital will not be ventured where the Constitution and laws are set at defiance, and distraction, apprehension, and alarm take the place of peace-loving and law-abiding social life. All parts of the Constitution are sacred, and must be sacredly observed—the *parts that are new* no less than the parts that are old. The moral and material prosperity of the Southern States can be most effectually advanced by a hearty and generous recognition of the rights of all by all—a recognition without reserve or exception. With such a recognition fully accorded, it will be practicable to promote by the influence of all legitimate agencies of the General Government the efforts of the people of those States to obtain for themselves the blessings of honest and capable *local* government.

"If elected, I shall consider it not only my duty but it will be my ardent desire to labor for the attainment of this end. Let me assure my countrymen of the Southern States that if I shall be charged with the duty of organizing an administration, it will be one which will regard and cherish their truest interests—the interests of the white and colored people both and equally; and which will put forth its best efforts in behalf of a civil policy which will wipe out forever the distinction between the North and South in our common country."

I have given all that the letter contains on the subject under discussion. I will not pause here nor take the time and space to analyze the resolution and the acceptance of it just given, but will presume upon the candor and intelligence of the reader of this article, and leave each one to analyze and compare for himself the "Resolution" and the "Letter." When this is done, a candid judgment can be formed of what Governor Hayes said and what he intended when he wrote and made public his letter of acceptance.

WHAT WAS THE INTENTION OF GOVERNOR HAYES ON THIS SUBJECT AS EXPRESSED IN THIS LETTER?

Briefly stated, it was the expressed determination in good faith, and with the exercise of the powers which his position as Executive of this great Nation should give him, to effect "the *permanent* pacification of the Southern section of the Union and the complete protection of *all* its citizens in the free enjoyment of *all* their rights," as is expressed in the first lines of the resolution. The great burden of the letter on this point was as to the most sure method and means of accomplishing "*the permanent pacification of the Southern section of the Union.*"

No careful reader of the resolution and letter can come to any other conclusion. How could this be done in the most effectual and speedy manner was the leading thought and the great burden on the mind of the writer as he penned the letter. The resolution was emphatic and so is the letter.

The resolution declares that Congress, by the recent constitutional amendments, is vested with the power to provide for the enforcement of the principles embodied in the "recent" amendments, and Congress and the Executive are called upon so to act by the exercise of all their constitutional powers as to *remove any just cause of discontent on the part of any class*, and to secure complete liberty and equality to every American citizen in the exercise of *all* civil and political rights.

The letter is to the same effect, but at the same time the drift of the letter is so plain "that he that runneth may read" that Gov-

ernor Hayes had in view the attainment of this end, not by cultivating the "arts of war," but the "arts of peace," by endeavoring to bring about "an era of good feeling," when the citizens of the different sections and races of this Nation "shall not," for the purpose of contending with each other, "learn war any more," but "shall beat their swords into ploughshares and their spears into pruning-hooks." We see, then, that the Convention in nominating, and Governor Hayes in accepting, were in accord.

THE INAUGURAL.

Has there then been a departure by the President since his inauguration from his former professed policy? Was there any indication of such departure in his inaugural address? I can only refer to this very briefly.

In the introductory part of the address he uses this language: "I wish now, when every motive for misrepresentation has passed away, to repeat what was said before the election, trusting that my countrymen will candidly weigh and understand it, and that they will feel assured that the sentiment declared in accepting the nomination for the Presidency will be the standard of my conduct in the path before me."

And then he proceeds immediately to speak of

"THE SOUTH."

The very same views are expressed as in his "acceptance," only he is, if possible, more emphatic, and discusses the subject more at length.

It is evident from the whole tenor of the address that he desired and would aim at promoting and establishing in the South "the inestimable blessing of a wise, honest, and *peaceful* self-government," and he expressed the opinion unqualifiedly that "the evils which affect the Southern States can only be removed or remedied by the *united* and *harmonious* efforts of *both* races actuated by motives of mutual sympathy and regard."

He spoke of the need of *material prosperity* which was arrested by the war, and says: "But the basis of all prosperity for *that* as well as for every other part of the country is the improvement of the intellectual and moral condition of the people—universal suffrage should rest upon education. To this end liberal and permanent provision should be made for the support of free schools by the United States."

The letter of acceptance and the inaugural, both, are opposed to maintaining Southern State Governments by force, and by the use of the army and navy. If anything is clear this is clear. If anything is certain, this is certain. No citizen had a right to expect the contrary.

THE CONDITION OF THE SOUTH AT THE INAUGURATION OF PRESIDENT HAYES.

The new President found the whole South in a state of ferment and excitement unparalleled since the war. The people had been led to believe that instead of being liberated from the rule they have had since the war, backed by armed force, in some cases, they were now about to experience the force of "the iron heel of despotism," and that from this they saw no prospect of escape. This was a false view, but it was difficult to get them to understand it so; though it would not have been difficult if they had read what the President had written and declared, both before and at the time of his accession to the office.

THE PRESIDENT MUST BE CONSISTENT WITH HIMSELF.

He had already declared against force in the "pacification of the South," at least until an honest effort had been made by "the arts of peace" to accomplish this most important object, compared with which other matters were insignificant.

What then was to be expected of Governor Hayes on his accession to the Presidency?

Surely, as American citizens, having a just regard for the character and honor of the Nation and its Executive head, nothing less should or could have been demanded or expected but that, using all proper precautions, he should withdraw the military and leave the State civil power to try the *experiment*, at least, of governing, according to his expressed views as before given.

This he has done—no more, no less. If the experiment fails there still remains the constitutional and legal powers vested in him as President of the United States and in Congress to apply all needful remedies warranted by the Constitution and the laws.

Independent of expressed views, as above given, what was the President's duty?

Supposing President Hayes not in any way to have been committed to the policy adopted by him on his accession to the office, what then was his duty? First of all he must himself obey the Constitution and laws made for his guidance. This he must *do* not merely in their *letter*, but in their *spirit*.

He turns to the Constitution, which is first of all his guide, and he finds in the preamble that this instrument was adopted "in order to form a more perfect union, establish justice, insure domestic tranquility," etc. He looks to the South and sees anything but "perfect union" and "domestic tranquility." He sees, too, that the strong arm of

the military power of the Government is, and has been, used to promote union and tranquility, but has failed.

Moreover, he bears in mind that there is a solemn requisition of the Constitution *binding* upon the President and upon his conscience as well as his intellect, which is as follows:

"Before he enters on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

He knows also that by that same instrument he is made "Commander-in-Chief of the Army and Navy of the United States."

He well knows that another most responsible duty is incumbent upon him by the Constitutional provision, which is as follows: "He shall take care that the laws be *faithfully* executed."

The President in perusing the Constitution finds this further provision:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or the Executive (when the Legislature cannot be convened), against domestic violence."

Then he finds among the amendments these provisions:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

THE PRESIDENT'S POLICY TO BE CONTROLLED BY THE CONSTITUTION AND LAWS.

Governed by the Constitution and laws, independent of other considerations, what would be the unavoidable conclusion of the President as to the policy he should adopt as to the South? He has already taken the oath to "faithfully execute the office" and to the "best of" his "ability preserve, protect, and defend the Constitution of the United States." He is now to "take care that the laws be *faithfully* executed." Naturally enough the President, finding the military controlling or sustaining the civil power in certain States, searches for the warrant for so doing, and to ascertain what warrant for this is found under that provision of the Constitution that "the United States shall guarantee to every State in this Union a republican form of government" and "against domestic violence."

In construing the provisions of the Constitution we cannot presume a power where none is given. There are implied powers, but they are only for the purpose of carrying out those expressly granted. This has been long established by the highest authority.

"The Federal Government is one of delegated powers. All powers not delegated to it or inhibited to the States are reserved to the States or to the people."

Briscoe vs. Bk., Ky., 11 Pet., on p. 317.

"The National Government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered."

Gilman vs. Phila., 3 Wallace, on p. 725.

WHO SHALL DECIDE

Whether the contingency has arisen for interfering to guarantee "a republican form of government" or "against domestic violence"?

When the question to be determined is as to whether a State has a republican form of government, it has been established by the highest authority of the Nation that Congress only has the power to decide under this Article of the Constitution, "What Government is the established one in a State." [Luther vs. Borden, 7 How. 42.] It is held by the same authority that in case of "domestic violence" Congress might and has conferred upon the President the right to decide, and his decision is conclusive. "He is to act upon the application of the Legislature or of the Executive, and consequently he must determine what body of men constitute the Legislature and who is the Governor before he can act." [Id. 42-3.]

Another point decided is that if the recognized State judicial tribunals have determined this question, that is conclusive and will be recognized by the various departments of the National Government. It was so settled in the case of Luther vs. Borden [7 How. 40], growing out of the Dorr rebellion.

The rule of decision in the Supreme Court of the United States is "That the courts of the United States adopt and follow the States courts in questions which concern merely the Constitution and laws of the State."—[Id. 40.]

So far has this principle been carried that the Federal Supreme Court has in several instances reversed its own decisions to make them conform to the decisions of the highest court of a State. Green vs. Neals, lessee, 6, Pet. 291. Suydam vs. Williamson, 24 How. 427.

The President cannot interfere in any case where the only question is whether the State is under "a republican form of govern-

ment." Congress is the sole judge of that. He can interfere in the case of "domestic violence" only on the application of the Executive "when the Legislature cannot be convened."

When the present Executive came into office he found two sets of State officers and two Legislatures in each of the States of South Carolina and Louisiana, claiming to be the lawful and constitutional authorities. So far as South Carolina was concerned, the Supreme Court of the State had already decided that the Returning Board could not exercise the power claimed and thereby change the result in the State—that the legality or illegality of the election of State officers must be the subject of after consideration before the proper State tribunals. This substantially determined that Hampton and those of the same party were elected, and not Chamberlain and his party. The authority of the Supreme Court, as a lawfully constituted court, was not disputed. Following the decision of *Luther vs. Borden* before referred to it would seem that no alternative was left to the President but the withdrawal of the troops from the support of either party.

As to Louisiana, the President found that in the then condition of things he could not, if he would, decide intelligently which party was entitled to be treated as the lawful, constitutional Government of the State. If neither party was entitled to be recognized as such in the present state of affairs, then the contingency had not arisen for his interference in the State as in a case of "domestic violence." It was then for Congress solely to guarantee a republican form of government."

THE LOUISIANA COMMISSION.

In this state of things the President appointed a commission for the double purpose of effecting an amicable adjustment of differences and of ascertaining the legal and constitutional *status* of the claimants of each party to be the lawful State authorities.

REPORT OF THE COMMISSION.

This commission made its report setting forth the claims of each party, and especially the claim that while the Returning Board had the power to act as to the election of Electors, that being left to the Legislature by the Constitution of the United States, yet as to State officers and members of the Legislature that was fixed by constitutional provision, and the Legislature could not intervene a returning board between the returns of local election boards and the authorities to whom the returns by the Constitution of the State were required to be made. If this claim is true—and it does not seem to be denied—then as to State officers and members of the Legislature the intervening returning board had no authority. It is further ascertained that the Packard party had no power to sustain itself independent of the military held there under the command of the President. Under this state of things it was advised by the commission that a union of members of the Legislature should be formed whose election was undisputed, and thus a foundation would be laid for a State Government whose authority would be unquestionable. A Legislature was so formed and constituted, and this Legislature recognized the Nicholls Government, and the other party abandoned it. Nicholls then, as before, demanded the *withdrawal of the troops*.

In this condition of affairs what could be done in either State but withdraw the troops and leave the States of South Carolina and Louisiana to manage their own domestic affairs?

The party in power in each State insisted on the withdrawal of the military of the United States, and the President had no constitutional or legal authority to retain them there for the purpose of sustaining the opposite party in power.

There is no doubt a discretion given him to decide the question so as to even make a wrong decision effectual to maintain a party in power till Congress interferes and decides the matter. A corrupt decision even may do this. But it is not to be supposed that an Executive of the United States is capable of doing this, nor of even exercising an extremely doubtful power toward or against a State.

THE PRESIDENT HAD NO ALTERNATIVE BUT THE WITHDRAWAL OF THE TROOPS.

This whole subject is under the power and authority of Congress. The President has no power or authority in the premises except what Congress confers upon him. Congress may also take away or modify at any time any power it may confer upon the President.

Take a little retrospect. As to Louisiana, this controversy had been going on for years. During a portion of that time the Republican party had a majority in both branches of Congress; but Congress did not then interfere to legislate and determine the question of interference. During the late Congress a large majority of the House were opposed to this policy in any Southern State, and no appropriation could be obtained for the army but subject to the prohibition that it should not be used in the Southern States.

To say the most that can be said in favor of keeping the troops in these States, it is certainly extremely doubtful whether the President had any constitutional authority to

interfere by the use of the military power. In such a state of things the only proper course is to submit the matter to Congress, from which he derives his power, and let that authority which is the source of all the power the President has in the premises take the responsibility, the Executive abiding the result. There is no other possible policy which President Hayes could or can adopt and carry out, even if he would

THE MEANS OF SUSTAINING THE ARMY

are withheld from him; and if every other constitutional and legal means existed to justify keeping the military there to sustain a party in possession of the State Government, his efforts would be in vain. Aside from this, the President ought not, against the strongly expressed will of the popular branch of Congress, to insist on the military occupation of a State.

THE RECONSTRUCTED STATES.

It is supposed by many that these States having been in rebellion and reconstructed, they are to be treated differently from other States in regard to using the army and navy in executing the laws in those States, and "against domestic violence." But no authority whatever exists in relation to any Southern State, as to using troops to sustain the Government against "domestic violence," or for any other purpose, that does not exist as to Ohio or any other Western or Northern State, and no discrimination can be made against them under the Constitution and laws of the United States.

It is the recognized invariable rule of law now held in the Federal Supreme Court that "A State entering into the Union since the adoption of the Constitution forms a Union with the other States as complete, as perpetual, and as indissoluble as the Union between the original States." 5 Abb. Nat'l Dig., 445, sec. 2; Texas vs. White, 7 Wallace, 700.

It is further held by the same authority that the States entering into the rebellion were never States out of the Union, but their rights were held in abeyance or suspended only till reconstructed under the authority of Congress. Texas vs. White, 7 Wallace, 700; White vs. Hart, 13 Wallace, 646.

So when they were re admitted to the exercise of their State rights in the Union they stood precisely where they did before their attempted withdrawal or secession.

THE RESOLUTION OF THE REPUBLICAN CONVENTION BEFORE REFERRED TO.

This resolution clearly contemplated action by Congress devising and inaugurating a policy, before it was expected the President would or could act upon the subject. This is perfectly apparent from the whole tenor of the resolution, and it moreover declares that "the power to provide for the enforcement of the principles embodied in the recent constitutional amendments is vested by those amendments in Congress," and then Congress and the Executive are called upon to act upon the subject. In all this it is evident that the Convention understood that there was no sufficient legislation on the subject then existing, and the resolution looked forward to the election of a Congress that would provide the necessary remedy, and to the election of an Executive that would enforce the provisions made; and of course there is no sufficient basis on which the President can now act—and as Congress is now constituted there is no present prospect that there will be any legislation on the subject for the President to carry out.

CONCLUSION.

1. Having fully gone over the ground intended when I commenced this paper, I believe every intelligent citizen, on careful reflection, will agree with me, that no one could possibly have been misled by anything which was written, said, or done by the President, up to and including his inauguration into office, nor could any one have reasonably anticipated any other action than what has taken place as to the removal of troops.

2. I think I have shown that since the inauguration, the policy pursued by the present administration in withdrawing the troops from South Carolina and Louisiana was, *under the circumstances*, the only thing proper to be done, and was the only thing which could constitutionally or lawfully have been done.

3. It is perfectly clear that the President had no alternative but the withdrawal of the military forces, as all supplies were refused and would have continued to be refused for the maintenance of the army or any portion of it used in any Southern State for the purpose of maintaining order, or sustaining the authority of any parties claiming to be the rightful Government of the State.

Having carefully studied and considered the subject discussed, I have arrived at the foregoing conclusions, and now submit the result of my reflections and investigations to the judgment of others, trusting that the contents of this paper may be subjected to the severest scrutiny, and to the closest, but at the same time, *candid* criticism; trusting also that if the true view is not here taken and the correct conclusions arrived at on the subject discussed, some one will undertake the discussion and *bring out* the *true view*.

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